

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY  
BRANCH 22

MARCUS J. EASTERN,

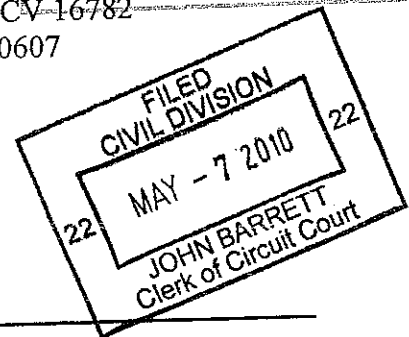
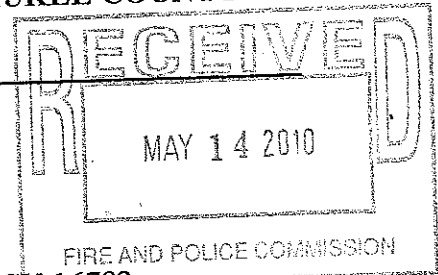
Petitioner,

v.

BOARD OF FIRE AND POLICE  
COMMISSIONERS OF THE  
CITY OF MILWAUKEE,

Respondent.

Case No.: 09 CV-16782  
Case Code: 30607



DECISION AND FINAL ORDER

INTRODUCTION

Petitioner Marcus Eastern seeks review and relief by this court from a decision issued by the Board of Police and Fire Commissioners of the City of Milwaukee ("the Board"). The petitioner seeks statutory review of the Board's decision under Wis. Stat. § 62.50(21) of the Board's finding that the petitioner was untruthful when questioned by the Chief of the Fire Department.

On March 30, 2009, Milwaukee Fire Chief Douglas Holton terminated Eastern for violations of Milwaukee Fire Department Rule 24.2, General Conduct; Rule 27.2, Violations - #14, Untruthfulness; and Rule 27.2, Violations - #20, Any other act or omission contrary to good order and discipline, or constitution a violation of any of the provisions of the rules and regulations, or of any department numbered notices. The petitioner chose to appeal his termination to the Board, and on March 31, 2009, the Chief filed these charges against eastern with the Board.

The Board concluded that the three rule violation charges alleged by the Chief had been sustained by a preponderance of the evidence. The Board then took testimony regarding the penalty and concluded that the Chief applied the rules fairly and without discrimination against the petitioner and that the Chief's proposed discipline reasonably related to the seriousness of the violations and to the petitioner's record of service with MFD. The Board sustained the Chief's decision to terminate Eastern.

### **BACKGROUND**

The petitioner faced disciplinary proceedings for his participation in a the filming and distribution of a conversation that included Edgar Brooks, a fellow MFD member, and Jacobi Cobb, a Menomonee Falls firefighter. Cobb created a video recording of the conversation and uploaded the video to YouTube, a website that allows users to both upload and stream videos over the Internet.

The Chief alleged that the petitioner's participation in the making and release of this video violated Rule 24.2, which prohibits conduct that reflects poorly upon the department. The Chief further alleged that the petitioner violated Rule 27.2 by being untruthful during the investigation of the incident and by acting contrary to good order and discipline.

The Board made the following findings of fact:

- 1) The Chief of the Fire Department for the City of Milwaukee, Douglas Hotlon, charged the respondent with three (3) violation of the Rules and Regulations of the Department: to wit:
  - a. Rule (24.2) General Conduct;
  - b. Rule (27.2) Violations - #14 Untruthfulness;
  - c. Rule (27.2) Violations - #20 Any other act or omission contrary to good order and discipline, or constituting a violation of any of the provisions of the rules and regulations, or of any department numbered notices. Numbered Notice # 2006-06 "Commitment to Professional Conduct and Behavior."

- 2) The parties, through their attorneys, who made an opening statement prior to the taking of testimony, stipulated that there exists, as a matter of law, the following facts and that these need not be proven by the Chief:

Just Cause Standard #3

Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.

Just Cause Standard #4

Whether the effort described under subd. 3 was fair and objective.

Just Cause Standard #5

Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.

- 3) The Commission finds that each of the stipulated facts also are established by the record in this case based upon the documents admitted and the testimony offered and received, all to a preponderance of the evidence standard.
- 4) The Commission finds that Just Cause Standard #1 whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct; and Just Cause Standard #2 whether the rule or order that the subordinate allegedly violated is reasonable, have been established by a preponderance of the evidence.
- 5) The Commission finds that the allegations of the three rule violation charges alleged by the Chief are sustained by a preponderance of the evidence.
- 6) At the conclusion of the testimony, the parties offered into evidence their Exhibits 1 through 8, which were received. The hearing examiner marked as Commission Exhibit 1, a copy of the Just Cause Standards from the form that the Commissioners reviewed. Exhibit 2 is a copy of the transcript of the video and a copy of the video, which was not physically marked, but was reviewed and considered by the Commissioners during the hearing.
- 7) The Commissioners duly adjourned into closed session pursuant to Wis. Stats. § 19.85(1)(b), to consider the evidence, and upon returning to open session, announced their decision, which was unanimous, that the charges had been sustained by a preponderance of the evidence.
- 8) Testimony was taken as to the penalty phase (phase two) and the respondent testified and presented various current and former Fire Department Officers. The Chief testified in this phase in addition to his testimony in phase one.
- 9) The Commissioners adjourned into closed session pursuant to Wis. Stats. § 19.85(1)(b), to deliberate and, upon reconvening in open session, announced their decision, which was unanimous, that the Chief applied the rules or orders fairly and without discrimination against the respondent and further, that the Chief's proposed discipline reasonably relates to the seriousness of the violations and to the respondent's record of service with the Fire Department. These findings are to a preponderance of the evidence.

During Phase I of the hearing, in which the Board determined whether to sustain the Chief's allegations, the Board heard testimony from the Chief, the petitioner, and the petitioner's grandfather, who is also a retired MFD battalion chief. During Phase II of the hearing, in which the Board considered the petitioner's penalty, the Board heard testimony from the petitioner, and three current MFD members, one retired MFD, and the president of Milwaukee Professional Firefighters Local 215.

In appealing the Board's decision to this court, the petitioner does not contest the Board's findings that he violated Rule 24.2 or Violation #20 of Rule 27.2. The petitioner does, however, contest the Board's finding that he was untruthful during the investigation.

### **STANDARD OF REVIEW**

Wis. Stat. § 62.13(5)(em) provides that no firefighter may be removed by the Board, except for just cause. In determining just cause, the Commission must make its findings in writing and consider:

1. Whether the subordinate could reasonably be expected to have knowledge of the probable consequences of the alleged conduct.
2. Whether the rule or order that the subordinate allegedly violated is reasonable.
3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.
4. Whether the effort described under subd. 3 is reasonable.
5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
6. Whether the chief is applying the rule fairly and without discrimination against the subordinate.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

Pursuant to § 62.13(5)(i), the petitioner seeks review of the Board's decision regarding the Board's finding that the chief discovered substantial evidence that the petitioner was untruthful during the investigation. § 62.13(5)(i) establishes that this court's review is limited to asking, "Upon the evidence is there just cause, as described under par. (em), to sustain the charges against the accused?" See *In re Disciplinary Charges Against Younglove*, 218 Wis.2d 133, 138-40 (Ct. App. 1998)..

This court defers to the credibility determinations of the Board and therefore will only determine whether there was sufficient evidence to sustain the Board's finding that the suspension and demotion reasonably relate to the seriousness of the offense and the petitioner's record of service.

#### ANALYSIS

The Board found that the parties had stipulated that just cause standards 3, 4, and 5 had been established with regard to all charges. The petitioner, however, argues that he only stipulated to those just cause standards with regard to the Rule 24.2 and the Rule 27.2, Violation #20 charges. The petitioner maintains that he did not stipulate to anything regarding the untruthfulness charge. A review of the hearing transcript reveals that petitioner's counsel did indeed inform the Board that he was not stipulating to the just cause standards regarding the untruthfulness charge. (Transcript at pp. 53-55.) Nevertheless, the Board's third finding of fact stated: "The Commission finds that each of the stipulated facts also are established by the record in this case based upon the documents admitted and the testimony offered and received, all to a preponderance of the evidence standard." Therefore, this court need only determine whether the untruthfulness charge was sustained by a preponderance of the evidence.

In determining whether the petitioner was untruthful, the Board considered the video and its transcript, the petitioner's statements to Chief Holton and Assistant Chief Brian Glassel during the investigation, Chief Holton's hearing testimony, and the petitioner's hearing testimony.

The video contains a statement directed to "ladies on YouTube, Facebook, MySpace" made by Cobb; the petitioner did not object to this statement. The video contains other statements that a reasonable person could interpret were intended to be made to a wider audience. Just before the recording concluded, the petitioner informed Cobb that he wanted to see the video "up" without ever referencing a specific website.

On March 23, 2009, Glassel interviewed the petitioner and Brooks. Assistant Chief Glassel asked the petitioner whether he had decided to record something for YouTube. The petitioner stated that he did not intend for it to be on YouTube. Chief Holton testified that he believed the petitioner was not being truthful when he stated that he did not intend for the video to be put on YouTube.

It is not for this court to determine witness credibility. Given the reference to a YouTube audience on the video, to which the petitioner did not object; the public nature of some of his statements on the video; and the petitioner's general request that Cobb put the video "up," the Board's finding that the petitioner was untruthful during the investigation is supported by substantial evidence.

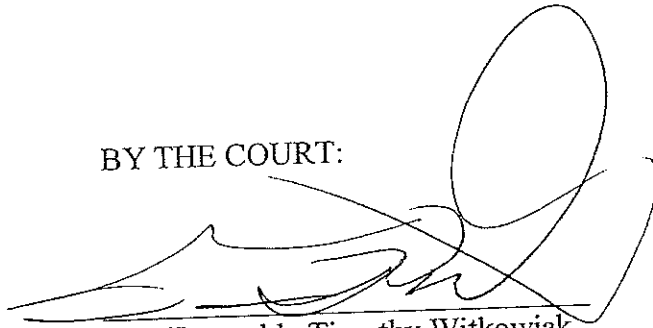
### **CONCLUSION**

Based on the record, briefs and arguments of the parties, this court finds that the decision to terminate petitioner from the Milwaukee Fire Department was based upon the evidence, was reasonable, and was not based upon an incorrect legal theory.

Accordingly, IT IS ORDERED that the decision of Board of Police and Fire Commissioners of the City of Milwaukee is **AFFIRMED**.

Dated this 7 day of May, 2010, in Milwaukee, Wisconsin.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Timothy Witkowiak', written over a horizontal line.

The Honorable Timothy Witkowiak  
Milwaukee County Circuit Court, Branch 22